IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 489

HUDSON DISTRIBUTORS, INC.,
Appellant,

v.

THE UPJOHN COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO

BRIEF FOR THE APPELLEE

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Preliminary Statement

Plaintiff below, defeated in the Ohio Supreme Court in a suit for judgment declaring the unconstitutionality of the Ohio Fair Trade Act of 1959, appeals to this Court upon asserted Federal grounds which in our submission do not exist in the present posture of the case.

The Jurisdictional Statement claims jurisdiction under 28 U.S.C. §1257 and presents five Federal questions with respect to the alleged unconstitutionality of the Ohio Act. However, the judgment below in this case (and in the *Lilly* case, No. 490) does not have the requisite finality to sustain jurisdiction in this Court.

In addition, none of the five Federal questions presented (Jurisdictional Statement pp. 4-5) was passed on by the

Ohio Supreme Court. Appellant admits to this Court that the opinion below was concerned only with Ohio law (Brief p. 23). The questions now raised either were not presented at all in the courts below, do not arise out of the facts in this case, or were abandoned or reserved by stipulation of counsel.

Appellant's scattering and discursive brief, written without regard to the narrowness of the issue arising from the decision below, obliges us to burden the Court with an unusually detailed statement of the proceedings in Ohio.

Opinions Below

The opinion of the Ohio Supreme Court (R. 413-24) is reported at 174 Ohio St. 487, 190 N.E. 2d 460 (1963). The judgment entered thereon is printed in the record (R. 425).

The opinion of the trial court (R. 371-79), the Court of Common Pleas for Cuyahoga County, is not officially reported but is printed in 1960 CCH Trade Cases ¶ 69,778. The judgment entered thereon is printed in the record (R. 369-70). The opinion of the Court of Appeals for Cuyahoga County (R. 380-408) is reported in 18 Ohio Op. 2d 182, 176 N.E. 2d 236 (1961). The judgment entered thereon is printed in the record (R. 411-12).

Jurisdiction

Hudson asserts that jurisdiction of this Court to review the decision of the Ohio Supreme Court is conferred by 28 U.S.C. §1257(2). Upjohn is constrained by the record to submit that this Court has no jurisdiction because the judgment below is not a "final judgment" within the requirement of 28 U.S.C. §1257, *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62 (1948), and does not present

any substantial Federal question which was either expressly or necessarily decided by the Supreme Court of Ohio.

Questions Presented

A. As to Jurisdiction

1. Whether the judgment of the Ohio Supreme Court is a final judgment within the meaning of 28 U.S.C. §1257 in view of the fact that the Ohio courts, pursuant to stipulation of counsel, reserved decision on a number of legal and disputed factual issues, including one of the most important issues raised by Hudson in this Court, *viz.*, the consistency of the Ohio Fair Trade Act of 1959 with *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

2. Whether any of the Federal questions presented to this Court was actually or necessarily decided by the Ohio Supreme Court.

B. As to the Merits of the Appeal

If the above issues do not dispose of the appeal, the remaining questions are:

1. Whether the facts in this case establish any conflict between the Ohio Act, as applied to appellee Upjohn's distribution system, and the *McKesson & Robbins* case.

2. Whether there is any evidence in the record that Upjohn, pursuant to the Ohio Act, compelled its distributors to enter into "horizontal" price-fixing agreements.

3. Whether, under the facts in this case, the enforcement by Upjohn in Ohio of stipulated resale prices estab-

lished pursuant to the Ohio Act through *signed contracts* with some retailers in Ohio followed by *notice* to other retailers in Ohio, including Hudson, is permitted by the McGuire Act.

4. Whether the Ohio Act, under the facts in this case, is constitutional under the due process clause of the Fourteenth Amendment.

Statutes Involved

In addition to the statutes referred to by appellant (Brief p. 3 and Appendix A thereto), the following provisions 28 U.S.C. §1257 are involved in this case:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The Appendix to this brief includes the McGuire Act, 66 Stat. 631, in the form enacted including the preamble as well as those portions codified in 15 U.S.C. §45(a)(1)-(5).

The Ohio Fair Trade Act of 1959 is printed in full in appellant's brief, Appendix A, pp. 88-95. For the convenience of the Court, the sections of that Act most directly involved in this case are printed in the Appendix to this brief.

Statement of the Case

A. Background of Fair Trade in Ohio

Ohio first adopted a Fair Trade Act in 1936. This Act permitted manufacturers of trade-marked or brand name goods to enter into resale price maintenance agreements with retailers and authorized such manufacturers to enforce the minimum resale price set in such express agreements against non-signing retailers. On January 22 1958 the Ohio Supreme Court, while upholding the legality of resale price maintenance agreements as such, held that the non-signer clause violated the Ohio Constitution as *inter alia* an illegal delegation of legislative power. *Union Carbide & Carbon Corp.* v. *Bargain Fair, Inc.*, 167 Ohio St. 182, 147 N.E. 2d 481 (1958). No Federal questions were discussed in that case.

Eighteen months later the Ohio Fair Trade Act of 1959 ("Ohio Act") was enacted to take effect on October 22 1959. Under the Ohio Act, a manufacturer such as Upjohn is permitted to enforce under Ohio law not only express contracts entered into with Ohio retailers who have signed resale price agreements but also contracts implied in law with non-signing Ohio retailers who purchase the manufacturer's goods and elect to retain the benefit of the use of the trade-mark after having received notice of the established resale price.

The validity of this concept of implied contract under *State* constitutional law was the most important question presented to the courts below and the only one decided by them.

B. Facts and Initial Pleadings

Unlike the *Lilly* case (No. 490), there was no agreed statement of facts in the case at bar. The essential facts

on the basic issue of the State constitutionality of the Ohio Act were established by the pleadings and affidavits and were not controverted by the parties. In respect of the Federal questions which Hudson now seeks to present to this Court there were factual disputes which were never resolved. The Ohio courts properly made no findings of fact on those issues because, as demonstrated in detail below, the parties stipulated to reserve those issues for future determination.[1]

In the summer of 1959 Upjohn, a manufacturer of pharmaceutical and other products identified by trade-marks (R. 14), entered into numerous written agreements with Ohio retailers establishing the stipulated resale price on Upjohn trade-marked goods as of the effective date of the Ohio Act (R. 25, 28). By circulars dated July 31 1959 (R. 4) Upjohn sent notice of these signed agreements to virtually all retailers in the state, including Hudson, which operates a retail drug store in Cleveland, Ohio. Although Hudson never signed an agreement with Upjohn it received the notice specified by the statute (R. 29). Hudson has admittedly sold, and continues to sell, Upjohn's goods at prices below the stipulated prices in Ohio (R. 15).

The decision sought to be reviewed herein arose out of Hudson's Second Amended Petition for Declaratory Judgment, filed January 11 1960 (R. 8). In this document Hudson alleged, with much specificity, that certain sections of the Ohio Act were unconstitutional on particularized State and Federal grounds. Hudson admitted in the Petition facts sufficient to establish a *prima facie* violation by it of the Ohio Act.

The principal question presented to the three State courts below was whether the Ohio Act, with its concept of

1. As a result, few of the detailed "facts" set forth in Hudson's Brief, pp. 13-23, can be treated as facts properly before this Court.

implied contract, overcame the State constitutional infirmities of the 1936 Act as found in *Bargain Fair*. Hudson, however, also alleged (Petition, heading B) that "certain portions" of the Ohio Act "as hereinafter specified" were void and beyond the power of the State legislature because they were in conflict with the Sherman Act and the McGuire Act (R. 11-12). Of the three alleged defects in the Ohio Act, only the first is now urged before this Court. In substance, Hudson claimed that §1333.29(A) of the Ohio Act *allegedly* provides that a proprietor may establish resale prices by notice alone, and that this provision is in conflict with the McGuire Act in that the latter *allegedly* permits the States to authorize only "contracts or agreements" prescribing minimum resale prices (Hudson's Question 1(c), Brief p. 4). The second and third points were abandoned by Hudson and are not before this Court.[2] No mention was made in Hudson's Petition of Upjohn's distribution system or of its *del credere* wholesale agents.

Hudson also claimed (Petition, heading C) that various sections of the Ohio Act violate substantive due process under the Fourteenth Amendment (R. 12), and that (Petition, heading D) the void sections of the Act are so commingled with the rest that the whole Act is unconstitutional (R. 13). The questions presented to this Court include both of these claims (Hudson's questions 2 and 3, Brief, pp. 4-5).

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2. In substance, these were that §1333.32(A) of the Ohio Act, which provides that it is unlawful for a non-signer with "notice" to sell below the minimum price, is in conflict with the McGuire Act in that the latter requires the non-signer to act "wilfully and knowingly"; and that §1333.32(B) of the Ohio Act, which permits suit by any person "reasonably anticipating damage", is in conflict with the McGuire Act in that under the latter suit may be brought only by a person "actually damaged" (R. 11-12).

Upjohn filed an answer denying that the Ohio Act was void (R. 14-15), and a Cross-Petition alleging breach of contract and unfair competition and asking for injunctive relief, money damages and costs (R. 15-24). Hudson filed a Reply to Upjohn's answer and an Answer to the Cross-Petition on March 8 1960. Hudson's first Answer to the Cross-Petition did not contain any affirmative defenses.

C. Upjohn's Motion for Summary Judgment

On April 19 1960 Upjohn moved under Page's Ohio Rev. Code Ann. §2311.041 (Supp. 1963) for summary judgment on the issues raised by Hudson's Petition and Upjohn's answer and upon Upjohn's prayer, in the Cross-Petition, for injunctive relief.[3] Upjohn filed supporting affidavits and alleged that there was no dispute about the material facts and that only questions of law were presented. Page's Ohio Rev. Code Ann. §2311.041(C) (Supp. 1963) authorizes the trial court on summary judgment to consider each aspect of the case separately and grant partial relief.

After Upjohn moved for summary judgment, but before the argument of the motion, Hudson filed on April 25 1960 an Amended Answer to the Cross-Petition in which for the first time two affirmative defenses were raised. The first, based on Federal law, alleged that Upjohn sold to retailers in competition with its wholesale distributors and that the last sentence of §1333.29(A) of the Ohio Act which authorizes such conduct is in conflict with the McGuire Act. This is the *McKesson & Robbins* point presented by Hudson's question 1(a), Brief p. 4.

3. Under the motion the matter of damages and attorneys' fees to which Upjohn might be entitled was reserved for later determination.

The second defense, based on State law, alleged waiver through non-enforcement against others.[4]

In support of its position on the motion, Hudson submitted its own affidavits and one deposition.[5] On May 2 1960 Upjohn served an affidavit controverting Hudson's factual allegations, particularly those relating to Upjohn's distribution system and its use of *del credere* agency agreements (R. 101-05). These conflicting affidavits created factual issues relating to that aspect of the case dealing with Upjohn's Cross-Petition for injunctive relief and Hudson's Amended Answer thereto raising the *McKesson & Robbins* point and waiver.

D. Reservation of Issues by Stipulation of Counsel

Before the oral argument on the motion for summary judgment which was heard on May 5 1960, counsel for both parties stipulated in open court that only the constitutional issues raised in Hudson's Petition and Upjohn's answer would be heard by the court, and the issues raised by Upjohn's Cross-Petition for injunction and Hudson's Amended Answer thereto (*McKesson & Robbins* and waiver) would be reserved for future determination. This stipulation eliminated the issues on which factual disputes were presented and enabled the court to proceed without trial on the basic legal issue of the validity of the Ohio Act under the Ohio Constitution. Hudson described this stipulation in its Brief in Support of Motion to Certify

4. Hudson served a Second Amended Answer to the Cross-Petition (R. 27-30) on June 16 1960 after the motion for summary judgment had been argued; however, there is no material difference, for purposes of review in this Court, between the Amended Answer and the Second Amended Answer.

5. Hudson's affidavits were filed between April 27 1960 and August 26 1960 (R. 368-70). The last, referred to in Hudson's Brief pp. 22-23, was filed after the trial court rendered its decision.

Record (pp. 3-4) filed in the Ohio Supreme Court, by means of which the questions of law presented by this phase of the case were brought before the Ohio Supreme Court:

> "Both The Upjohn Company and Eli Lilly & Company filed answers to plaintiff-appellant's petitions and also filed cross-petitions for damages, temporary injunctions and permanent injunctions. The Honorable Joseph H. Silbert, Judge of the Court of Common Pleas of Cuyahoga County, refused defendant-appellees' motions for temporary injunctions pending determination of the constitutionality of the Fair Trade Law.
>
> In order to narrow and thereby to expedite the determination of the issues before the Court, the parties agreed that the cases should be heard by the Court of Common Pleas on the issues raised by plaintiff-appellant's petitions for declaratory judgments and defendant-appellees' answers thereto. The litigation was therefore narrowed to the basic issue of the constitutionality of the new Fair Trade Law. The parties reserved for future determination the issues raised by defendant-appellees' cross-petitions and plaintiff-appellant's replies."[6]

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6. Similarly, in its Brief On the Merits (p. 4) filed in the Ohio Supreme Court, Hudson described the stipulation in this case in the following manner:

> "On May 2, 1960 the parties, by agreement, proceeded to trial solely on the allegations in Hudson's second amended petition, Upjohn's answer, and the reply thereto. The issues before the Trial Court were limited to the question of the constitutionality of the 1959 Fair Trade Law. All issues raised by Upjohn's cross-petition and Hudson's answer thereto were expressly reserved."

These stipulations are recited in Hudson's Jurisdictional Statement p. 7 and Appellant's Brief herein p. 15.

E. Joint Consideration with the *Lilly* Case (No. 490)

Each of the courts below considered this case jointly with the *Lilly* case and as presenting similar issues. Such parallel treatment reflected the fact that the cases were presented and decided upon limited issues only. In the *Upjohn* case the stipulation of counsel removed from the area of decision the *McKesson & Robbins* and waiver points raised by Hudson as affirmative defenses to the Cross-Petition for injunction. No affirmative defenses were pleaded at this time in the *Lilly* case (Lilly R. 18-19); the *McKesson & Robbins* point was never raised inasmuch as Lilly sells only to wholesalers and makes no sales to retailers (Lilly R. 19-20). Thus the two cases proceeded on the common issue of the constitutionality of the Ohio Act under the Ohio Constitution.

The trial court stated that the cases involved the "same questions" (R. 371). Similarly the Court of Appeals for Cuyahoga County concluded "Both cases involve similar facts and, with the questions to be determined by this Court the same in each case, the appeals will be considered together" (R. 380). The same conclusion was reached by the Supreme Court of Ohio, which stated that "The facts in both cases are similar and the law applicable is the same" (R. 413).

F. Decisions Below

The Ohio courts did not decide any Federal questions and no Federal question was necessarily passed on by implication. The trial court held that the concept of implied contract in the Ohio Act was void under the State constitu-

tion because of the unlawful delegation of legislative power condemned in *Bargain Fair* (R. 371-79). No other issue was decided. On appeal to the Court of Appeals for Cuyahoga County, the judgment was reversed, the Court holding by two to one vote that the implied contract theory was constitutional under the State constitution (R. 380-408). Neither the majority nor the dissenting opinions referred to any Federal question,[7] although the judgment recites that the Act was "neither in violation of the Constitution of the State of Ohio nor of the Constitution of the United States" (R. 412).[8] The case was remanded "for further proceedings according to law with respect to the cross-petition filed in this cause" by Upjohn (R. 412). On appeal to the Ohio Supreme Court, the judgment of the Court of Appeals for Cuyahoga County was affirmed by a minority vote. As Hudson here admits, the opinion of the Ohio Supreme Court "was concerned solely with the validity of the new Fair Trade Act under the laws of Ohio" and "never adverted to any issues concerning federal-state relationships in price fixing by private persons in interstate commerce" (Brief pp. 23, 27). After holding that the Ohio legislature under the Ohio Constitution, including Section 2, Article XIII, had the *power* to enact the Ohio Act under the known economic conditions (R. 419-23), the court stated (R. 423-24):

> "Two other matters are urged as to the constitutionality of this legislation.
>
> The first of these relate to the delegation of legislative power as to price fixing. . .

7. The dissenting judge said that the "single question" presented was whether the new Act overcame the decision in *Bargain Fair* (R. 406).

8. The judgment quoted in Hudson's Brief p. 2, is that rendered in the *Lilly* case (No. 490), not this case. The judgment in this case did not include the phrase "or of any law of the United States".

> The final contention is that such act violates the constitutional right of one to sell his own property on his own terms. . . . None of the constitutional attacks on this new act have merit."

Similarly, the opinion of the dissenting judges who thought the Ohio Act void under *Bargain Fair* (R. 424) did not mention any Federal questions. The judgment (R. 425) merely affirmed the judgment of the Court of Appeals. Nor was any Federal question raised in Hudson's application for rehearing filed with the Ohio Supreme Court. Hudson requested the three members of the court who voted to sustain the constitutionality of the Ohio Act to change their vote without necessarily changing their opinion in order to avoid problems of the Ohio Act's being constitutional in some counties in Ohio and unconstitutional in others.

Upjohn has not yet taken any action to move for trial of any of the reserved issues.

SUMMARY OF ARGUMENT

1. This Court does not have jurisdiction over this appeal for two separate reasons.

A. Lack of Finality

The courts below passed only on the common constitutional issues presented by the petitions for declaratory judgments in this case and the *Lilly* case (No. 490) and applicable to the undisputed facts common to both cases. Specifically, the trial court pursuant to stipulation of counsel reserved for future determination a number of legal and disputed factual issues, including the *McKesson & Robbins* issue raised by Hudson's first affirmative defense to Upjohn's Cross-Petition and

the disputed factual and legal issues connected with Upjohn's distribution system. The judgment of the Ohio Supreme Court is accordingly not a "final judgment" under 28 U.S.C. §1257.

B. No Federal Question

This appeal does not present any Federal question which was actually or necessarily decided by the Ohio Supreme Court.

The *McKesson & Robbins* question (Hudson's question 1(a)), relating to Upjohn's distribution system, was not before the courts below. Raised for the first time in Hudson's Amended Answer to Upjohn's Cross-Petition, it was excluded from decision by stipulation of counsel. Moreover, the question rested on disputed facts as to which the court made no findings. That this issue was not decided below is shown not only by the fact that it was not discussed in any of the opinions below, but also by the fact that the courts below treated this case and the *Lilly* case (No. 490) alike and the issne is not presented in the *Lilly* case.

The question relating to the assertion that §§1333.29 (B)(2) and (3) of the Ohio Act permits a proprietor to compel its distributors to enter into "horizontal" price-fixing agreements (Hudson's question 1(b)) is entirely hypothetical. The evidence in the record tendered no such question to the courts below and in fact the Upjohn *del credere* agreements specifically forbid the agents from controlling or attempting to control the prices at which their purchasers resell the goods. This question was never raised in any of the courts below with respect to Upjohn, and was raised for the first time with respect to Lilly in Hudson's reply brief in the Ohio Supreme Court.

The remaining McGuire Act question (Hudson's question 1(c)) relates to the allegation that the Ohio Act conflicts with the McGuire Act and the Sherman Act in authorizing the establishment of minimum resale prices by notice without the consensual agreement intended by Congress. This question is also hypothetical in that the undisputed facts show that Upjohn first established its minimum resale prices in Ohio by the use of written contracts with some retailers, and then gave notice to other retailers that it had established such prices by written contracts. Upjohn did not attempt to establish such prices by notice alone, and as shown below in the discussion of this point on the merits, Upjohn's activities are squarely within the terms of the McGuire Act. To the extent that Hudson is urging that the Ohio Act as written is defective in authorizing the establishment of resale prices by notice alone, it is asserting an interpretation of the Ohio Act neither made by the Ohio Supreme Court nor required to be made under the facts of this case.

The substantive due process question (Hudson's question 2), which in any event does not raise a substantial Federal question, was abandoned by Hudson and was not presented to any of the courts below as a Federal question. The claim of commingling (Hudson's question 3) is only ancillary and does not raise a Federal question at all.

In addition to the five questions tendered to this Court, Hudson makes a number of arguments based on the Lanham Trade-Mark Act and the Federal Food, Drug & Cosmetic Act (Brief pp. 36, 60, 72-76), none of which is properly before this Court.

2. Considered on the merits, none of the questions presented raises a real issue with respect to Federal law or the Federal Constitution.

Although its Brief is confused, Hudson apparently attempts to attack the Ohio Act on its face without regard to the facts in this case. The three McGuire Act questions urged by Hudson do not present any constitutional issues under the Supremacy Clause. The Federal antitrust laws apply to interstate commerce and any State fair trade statute as applied which conflicts with Federal law is unenforceable in situations involving interstate commerce Properly phrased, the real Federal issue presented by this appeal is whether the Ohio Act, as construed by the Ohio Supreme Court and applied to the facts in this case, is within the exemption of the McGuire Act. Hudson's suggestion that the Ohio Act is "void" and is "an attempt to repeal the McGuire Act" is *in vacuo* and groundless.

A. *McKesson & Robbins* Question (Hudson's Question 1(a))

Hudson claimed in its Jurisdictional Statement that Upjohn entered into resale price-fixing agreements with, and *sold* to, wholesalers with whom it competes and that such distribution system, established pursuant to the last sentence in §1333.29(A) of the Ohio Act, conflicted with §5(a)(5) of the McGuire Act and the *McKesson & Robbins* case. Hudson now admits that Upjohn's agreements with its *del credere* wholesale agents "retains in Upjohn the ownership of Upjohn products in the hands of such wholesalers" (Brief p. 18) and nowhere claims that the arrangements in fact involved *sales* to wholesalers. In this posture of the facts, Hudson can no longer claim (and no longer does so) that the Upjohn arrangement with its wholesalers was adopted pursuant to

§1333.29(A) of the Ohio Act in violation of §5(a)(5) of the McGuire Act. Instead, Hudson now appears to be arguing that apart from the Ohio Act and the McGuire Act, Upjohn's *del credere* agency agreements with its wholesalers violate the Sherman Act under *United States* v. *Masonite Corp.*, 316 U. S. 265 (1942). Such a claim, which is independent of any fair trade issue, was never presented below and is outside the scope of Hudson's petition for declaratory relief and this appeal.

In any event, Upjohn's use of *del credere* agents is sanctioned by *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), and does not conflict with *Masonite*.

B. "Horizontal" Price-Fixing (Hudson's Question 1(b))

Hudson's second question was never raised in the *Upjohn* case in the Ohio courts. There are no facts in the record to support this claim and it is entirely hypothetical. Upjohn in its resale price maintenance program did not include in either its contracts with its retail distributors or its agreements with *del credere* agents the provisions authorized by §§1333.29(B)(2) and (3) of the Ohio Act allowing the proprietor of a trade-mark or trade name to compel its distributors to enter into further agreements with other distributors. By necessity, therefore, there was no evidence of any use by Upjohn of such provisions to compel "horizontal" price-fixing agreements. In any event, the Ohio Act does not, as a matter of State law, authorize the use of such provisions to compel "horizontal" price-fixing agreements.

C. Notice Provision (Hudson's Question 1(c))

With respect to the third McGuire Act question, the manner in which Upjohn established its Ohio price main-

tenance program was fully in accord with the applicable Federal laws. Pursuant to the Ohio Act, Upjohn established resale prices in Ohio by entering into written contracts (of unquestioned legality) with other retailers before giving notice to Hudson that it had signed contracts establishing fair trade prices in Ohio. Such a notice is enforceable against Hudson both under paragraph 2 and paragraph 3 of the McGuire Act (§5(a)(2) and (3)).

Paragraph 2 of the McGuire Act sanctions in interstate commerce resale price maintenance "contracts or agreements" which are lawful in intra-state commerce. The test of what are "contracts or agreements" under paragraph 2 is a matter of State law, and Ohio has ruled that notice to Hudson and Hudson's subsequent purchase and use of trade-marked goods constitute a voluntary contract under Ohio law. Hence such a contract is lawful under Federal law.

The Upjohn notice to Hudson is enforceable against Hudson independent of the implied contract theory upon which the courts below sustained the Act under the Ohio Constitution. Paragraph 3 of the McGuire Act expressly provides for enforcement against persons, whether or not parties to a contract or agreement, who receive notice of minimum resale prices established by contract with others. It is significant that nowhere in its brief does Hudson discuss this provision of the McGuire Act, which covers precisely the facts of this case.

To the extent Hudson is arguing that the McGuire Act requires the State statute to be a statute "of a kind" which requires, and not merely permits, the establishment of resale prices by written contracts or agreements, Hudson is disregarding the McGuire Act,

including its preamble, and the pertinent legislative history. Moreover, it is asserting an interpretation of the Ohio Act—that it is a statute allowing establishment of prices by notice alone—which was not necessary for the decisions below, has not been reached by the Ohio Supreme Court, and may well be the incorrect interpretation of the Ohio Act in interstate commerce situations.

D. Due Process (Hudson's Question 2)

The Ohio Act, as applied to Hudson, does not violate the due process clause of the Fourteenth Amendment.

E. Commingling (Hudson's Question 3)

The commingling argument does not raise a Federal question.

ARGUMENT

POINT I

This Court does not have jurisdiction of this appeal because the judgment below is not final and because the Ohio Supreme Court did not actually or necessarily decide any substantial Federal question.

A. The Judgment Below Is Not Final Because the Trial Court Reserved for Future Determination Factual and Legal Issues Raised by Hudson's Amended Answer to Upjohn's Cross-Petition.

Jurisdiction of this Court to review by appeal decisions of State courts is based upon 28 U.S.C. §1257(2). It is a prerequisite to such jurisdiction that the judgment appealed from be a "final" judgment by the highest state court authorized to hear the case. *Republic Natural Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948); *Radio Station WOW, Inc.* v. *Johnson,* 326 U. S. 120, 123-27 (1945).

The requirement of finality for the review by this Court of decisions from State courts has been imposed by Congress since 1789, when this Court was first granted the power to review such decision by §25 of the Act of September 24 1789, 1 Stat. 73, 85. The general rule under U.S.C. §1257 is that the judgment must terminate the litigation between the parties on the merits so that, if there were to be an affirmance by this Court, the court below would have nothing to do but to execute the judgment or decree it had already rendered. See *Georgia Ry. & Power Co.* v. *Town of Decatur,* 262 U. S. 432, 437 (1923); *Gospel Army* v. *Los Angeles,* 331 U. S. 543, 546 (1947). The judgment below must be complete and dis-

pose of all the elements of the controversy and not of merely interlocutory or intermediate steps. *Market St. Ry.* v. *Railroad Comm'n*, 324 U. S. 548, 551 (1945). A remand for a new trial, for example, is not a final judgment since on retrial the plaintiff can amend its complaint and present new facts. *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 547 (1947).

Were this Court's jurisdiction not limited to "final" judgments from State courts,[9] litigants by means of piecemeal review would be free to come to this Court for "advisory" opinions on Federal questions which, after later proceedings, might prove unnecessary and irrelevant to a complete disposition of the litigation. *Pope* v. *Atlantic Coast Line R.R.*, 345 U. S. 379, 381-82 (1953); *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120, 123-24 (1945).

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9. Although Congress has in some instances required finality with respect to this Court's jurisdiction over cases in the *Federal* courts, *e.g.* Section 2 of the Expediting Act, 32 Stat. 823, 15 U.S.C. §29 (1958); see *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 304-11, 357-65 (1962), finality is not generally a prerequisite to jurisdiction of this Court over cases in lower Federal courts. See *e.g.* 28 U.S.C. §§1252, 1253, 1254, 1255, 1256 (1958). Similarly, the rule that Federal courts of appeal have jurisdiction from all "final decisions" of Federal district courts, 28 U.S.C. §1291 (1958), is a less strict finality doctrine than that under 28 U.S.C. §1257. See 28 U.S.C. §1292 (1958) allowing courts of appeal jurisdiction over certain interlocutory decisions from the Federal district courts. The strict interpretation of finality with respect to State courts as compared with Federal courts is not unrelated to the distinction between this Court's power to review only the Federal questions present in a case brought in the State courts and its general power to determine the entire case and controversy with respect to cases arising in lower Federal courts. See *Murdock* v. *City of Memphis*, 87 U. S. (20 Wall.) 590 (1875). Similarly, this Court's power of review is limited to the Federal issues raised before and decided by State courts although it has power to determine issues not decided by the lower Federal courts. See *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U. S. 430, 434-35 (1940).

Finality is a question for this Court to decide. *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942) (*per curiam*). Unless Hudson can sustain the burden of establishing this Court's jurisdiction on appeal, the appeal must be dismissed. *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942). On the record in this case, Hudson cannot sustain this burden.

The Court has now only one segment of the case at best. Before the trial judge heard either this case or the *Lilly* case, the parties had by stipulation reserved numerous issues in the manner set forth at pp. 9-10 above. The reserved issues in this case include those relating to Upjohn's distribution system and the applicability, if any, of the *McKesson & Robbins* case to Upjohn's use of *del credere* agents.

The purpose of this stipulation was to get an expeditious determination of the overriding State constitutional questions and to reserve for determination if necessary issues resting on disputed facts.

Without a trial of the disputed factual issues raised by the Cross-Petition and the Amended Answer thereto and by the conflicting affidavits,[10] the courts below could not develop a sufficiently full factual picture upon which to determine whether the alleged affirmative defenses, including the *McKesson & Robbins* point, were applicable. Further, these alleged defenses are only some of the affirmative defenses which, if applicable, Hudson would be free to urge upon the trial of the reserved portion of the case.

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10. *Compare* affidavit of Hudson's counsel (R. 56-60), which purports to interpret a deposition of one of Upjohn's employees (R. 86-96), *with* a later affidavit by the same employee which attempts to correct only the most flagrant errors and inaccuracies in the affidavit of Hudson's counsel (R. 101-105).

The case thus does not have the requisite finality. As was stated by Justice Brandeis in *Collins* v. *Miller*, 252 U. S. 364, 371 (1920) (direct appeal from Federal district court), "Only one branch of the case has been finally disposed of below, therefore none of it is ripe for review by this court." "And the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved." 252 U. S. at 370. This conclusion is particularly relevant here since Hudson is free in this case (as was done in the *Lilly* case) to amend further its Answer to the Cross-Petition and add affirmative defenses which were not previously pleaded.[11] See *Gospel Army* v. *Los Angeles*, 331 U. S. 543, 547 (1947); *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 72-74 (1946).

Nor will there be any irreparable harm to Hudson if this Court dismisses the appeal and determines that the raising of any Federal question now is premature. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949) and *Forgay* v. *Conrad*, 47 U. S. (6 How.) 201, 204 (1848) (review of lower Federal court decisions). Harm to Hudson of any nature would arise only from the moment the trial court enjoins further violations of the Ohio Act or orders Hudson to pay damages or costs. At the present time, all that has been determined is that the Ohio Act does not violate the Ohio Constitution. The trial court still must determine the validity of the defenses

11. In *Hudson Distribs., Inc.* v. *Eli Lilly and Co.*, 1963 Trade Cases ¶70,871 (Ct. of Common Pleas, August 7 1963), Hudson raised affirmative defenses for the first time on the trial of the second phase of the *Lilly* case. Similarly, to the extent that there is any merit in the Lanham Trade-Mark Act and related arguments belatedly urged in Hudson's Brief, pp. 36, 60, 72-76, such arguments raising Federal questions could be presented on the second phase of this case.

to Upjohn's Cross-Petition, both Federal and State, which Hudson has set up.

None of the opinions of this Court which have found the requisite finality in a State court judgment even though further proceedings were anticipated, *e.g. Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. 120 (1945), permits a finding of finality here.[12] Nor does this case contain any of the peculiar factors present in *Local No. 438* v. *Curry*, 371 U. S. 542 (1963), or *Mercantile Nat'l Bank* v. *Langdeau*, 371 U. S. 555 (1963), wherein this Court held that the finality rule was satisfied.

Piecemeal review of selected anticipatory defenses raised by a complaint seeking a declaratory judgment, with the issues raised by counterclaim and reply thereto reserved, is entirely inconsistent with the history of 28 U.S.C. §1257 and this Court's limited review of Federal questions arising in State courts. Accordingly, this appeal must be dismissed as not final.

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12. "[S]uch a controversy is a multiple litigation allowing review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled," *Radio Station WOW, Inc.* v. *Johnson*, 326 U. S. at 126. This is clearly not the situation in the present case. Nor does the judgment of the Ohio Supreme Court in this case (affirming the judgment of the court below which remanded for trial the issues raised on the Cross-Petition) fall in "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated". *Local No. 438* v. *Curry*, 371 U. S. 542, 549 (1963); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949). Neither is this a case in which for all practical purposes the litigation was terminated below for want of further defenses to offer in the State courts. See *Pope* v. *Atlantic Coast Line R.R.*, 345 U. S. 379, 382 (1953); *Local No. 438* v. *Curry*, 371 U. S. at 550-51. In this case, not only is the litigation not terminated, but the most substantial Federal question which Hudson alleges as a defense, the *McKesson & Robbins* issue, has been reserved.

B. None of the Federal Questions Raised by Hudson Was Actually or Necessarily Passed On by the Ohio Supreme Court.

Hudson has the burden of affirmatively proving that each of the questions presented for review in this Court was actually or necessarily passed on by the Ohio Supreme Court. See *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942). Once a case is brought to this Court from State courts, review is limited to the specific Federal questions that were properly raised in the State courts. *Whitney* v. *California*, 274 U. S. 357, 362-63 (1927); *Dewey* v. *Des Moines*, 173 U. S. 193, 197-98 (1899). A Federal issue that was not raised or decided below may not be the subject of review even though it could have been raised, *Adler* v. *Board of Educ.*, 342 U. S. 485, 496 (1952), and a Federal question not timely raised in the State courts and not considered therein, cannot be considered by this Court. *Stembridge* v. *Georgia*, 343 U. S. 541, 547-48 (1952).

It is evident from a study of the record and the stipulation that none of the five questions urged on this Court was necessarily decided below. Neither opinion in the Ohio Supreme Court mentions any Federal question. Indeed, Hudson has admitted to this Court that the opinion of the Ohio Supreme Court "was concerned, solely with the validity of the new Fair Trade Act under the laws of Ohio" (Brief p. 23).[13]

13. Hudson in its briefs below did seek to inject into the case two of the Federal questions relating to the McGuire Act now urged in this Court (the *McKesson & Robbins* question and the notice question, Hudson's questions 1(a) and 1(c)). In view of the nature of the proceeding below, Upjohn correctly stated in its briefs that with respect to such issues Hudson was presenting hypothetical or abstract questions or questions reserved for later determination. The fact that issues were briefed before the State courts does not establish that such issues were properly raised there. See *Live Oak Water Users' Ass'n* v. *Railroad Comm'n*, 269 U. S. 354, 358-59 (1926). In any event, question 1(b) (horizontal price-fixing) was never raised as to Upjohn.

That questions of State law only were decided is abundantly clear when each of Hudson's questions is examined separately.

1. The *McKesson & Robbins* issue (Hudson question 1(a)) was not properly before the courts below. It had been put up solely as an affirmative defense in Hudson's Amended Answer to Upjohn's Cross-Petition and, as such, had been specifically reserved by stipulation of counsel for later determination. Moreover, it rested on disputed facts as to which the court made no findings.

After Upjohn had filed its motion for summary judgment in the trial court on April 19 1960, Hudson filed an Amended Answer on April 25 1960 which raised the *McKesson & Robbins* question for the first time. Two days later Hudson's counsel filed a supporting affidavit (R. 56-60) purporting to interpret a deposition of one of Upjohn's employees. In response to the question whether one of Upjohn's wholesale agents, McKesson & Robbins, "*purchase* Upjohn products from Kalamazoo", the Upjohn employee replied, "They send their orders to the Cleveland Branch and the order is processed and all shipped from the Cleveland branch . . ." (R. 89) (emphasis added). The affidavit filed by Hudson's counsel said in paragraph 11 that "The witness further gave evidence that the products of The Upjohn Company are *sold* to various wholesalers which are independent business organizations; . . ." (R. 59) (emphasis added). On May 2 1960 Upjohn's employee filed an affidavit correcting the most "flagrant errors and inaccuracies" in the affidavit of Hudson's counsel (R. 101-05), attached a copy of its *del credere* agreements (R. 105-09), and stated that "This document speaks for itself and the relations with agency wholesalers are carried out in accordance with these terms" (R. 105). On this same day, a Vice President of Hudson filed an affidavit which said that McKesson &

Robbins, one of Upjohn's agents in Ohio, had not indicated it was acting as an agent and Hudson's affiliate at this time did not believe it was dealing with an agent (R. 70-72).

Thus, because of the stipulation limiting the issues, obvious factual disputes were not resolved by the courts below and the record made by the parties was limited and incomplete.[14]

2. The second issue set up by Hudson (question 1(b)) is the assertion that the Ohio Act attempts to repeal §5(a)(5) of the McGuire Act and §1 of the Sherman Act by authorizing the proprietor of a trade-mark or trade name to compel its distributors to enter into "horizontal" price-fixing agreements with other distributors. This question was never raised in any of the courts below with respect to Upjohn.

Presumably this allegation relates to the effect of §§1333.29(B)(2) and (3) of the Ohio Act which authorize the proprietor of a trade-mark to require a distributor with whom he has entered into a resale price maintenance agreement to make a similar agreement with other distributors to whom he may resell. As applied to the facts of this case, such an allegation is doubly hypothetical. Upjohn's contracts with its retail distributors and with its *del credere* wholesale agents (R. 25, 105) contain no such provisions, and in fact Section 6 of the *del credere* agreements specifically forbids any such price control by the agents (R. 107). It is clear that Upjohn has not sought to take advantage of

14. When and if the injunction issue is reached in the reserved phase of the case, the evidence will show that Upjohn discontinued using *del credere* agents in December 1961 and since that time has sold to wholesalers without attempting to set resale prices at the wholesale level of distribution.

§§1333.29(B)(2) and (3) and in its contracts has confined itself to the basic resale price maintenance provision of §1333.29(B)(1). Further, this argument by Hudson rests on a questionable interpretation of §1333.34 of the Ohio Act not made by the Ohio Supreme Court and makes §1333.34, which forbids horizontal price-fixing, meaningless.

3. The third issue tendered by Hudson (question 1(c)) is the claim that the Ohio Act is violative of the Supremacy Clause in that "the Act attempts to repeal Sections 5(a)(2), (3), (4) and (5) of the McGuire Act and Section 1 of the Sherman Anti-Trust Act by authorizing the 'proprietor' of a trademark or trade name, who need not necessarily be the owner thereof, to establish minimum resale prices by notice to distributors without the consensual agreement intended by Congress" (Brief, p. 4).

Thus stated, the question is purely hypothetical.[15] The facts as admitted by the pleadings show that Upjohn, which owns the trade-marks in question, first entered into written contracts with a number of retail distributors of its trade-marked products in Ohio establishing certain retail prices for such products and thereafter gave notice to Hudson of the retail prices so established. Whether a person who is *not* the owner of the trade-marks involved could enforce the Ohio Act is of purely academic interest in the present case. Similarly, the situation which

15. In *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.*, 205 F.2d 788, 792 (5th Cir.), *cert. denied*, 346 U. S. 856 (1953), the defendant claimed that under Louisiana law there was no requirement that the fair trade contracts be made by the brand owner. Since this question was not raised by the facts in the case, the Fifth Circuit held this a hypothetical question that should await the clarification and construction of the state statutes by the Louisiana courts, citing *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945); *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947); and *Watson* v. *Buck*, 313 U. S. 387 (1941).

would have prevailed had Upjohn *not* entered into contracts with other retail distributors in Ohio before giving notice to Hudson is not presented to this Court, nor was it decided by the courts below.

In developing this argument appellant has somewhat changed the focus of the point although it is difficult to determine what precisely is being urged. We do not think it is necessary for this Court to consider the various sub-arguments which Hudson is apparently urging (although we have attempted to set them forth and analyze them later in this brief).[16] It is sufficient to note that (with the possible exception referred to in the next paragraph) the arguments and sub-arguments are premised on the wholly suppositious case of one who is not the owner of a trade-mark attempting to employ the Ohio Act to establish *by notice alone* (without any prior written contracts) a resale price maintenance program in Ohio with respect to items being sold in interstate commerce. This is *not* the case presented to and decided by the courts below, nor is it the case presented here.

The possible exception referred to above is an apparent attempt by Hudson to argue that paragraph 3 of the McGuire Act (§5(a)(3)), which authorizes the States to permit action by proprietors against persons whether or not a party to a contract, not only requires resale prices to be established in the first instance by written contracts (as Upjohn did in this case) but also requires the State statute itself to be a type of statute which requires, and not merely permits, the establishment of such prices by written contracts. See Hudson's Brief pp. 30, 49. We believe that any such reading of the McGuire Act and its relationship to the Ohio Act would be completely untenable.[17]

16. See pp. 42-50, below.
17. See pp. 47-50, below.

But even if Hudson were right, it could not establish that this Court has jurisdiction to hear this question. The contention is premised on an interpretation of the Ohio Act neither expressly made by the Ohio Supreme Court nor necessary for its decision, *viz.* that the Act permits establishment of resale prices in interstate commerce by *notice alone* (without any prior written contracts). Although the Ohio Supreme Court did not construe this aspect of the Ohio Act, Hudson nevertheless asks this Court to adopt a construction which would assure its unconstitutionality on Hudson's theory of the McGuire Act. This Court has refused to accept jurisdiction under such circumstances. The controlling principle was laid down in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 470 (1945):

> "State courts, when given the opportunity by the presentation to them for decision of an actual case or controversy, may, and often do, construe state statutes so that in their application they are not open to constitutional objections which might otherwise be addressed to them. [Citations] In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. [Citations]"

Hudson can maintain this Court's jurisdiction over this question only if it is able to establish (i) that the

interpretation of the McGuire Act was passed on by the Ohio Supreme Court, (ii) that the question was resolved adversely to Hudson, and (iii) that the Ohio Act was interpreted so as to make it unconstitutional under Hudson's view of the McGuire Act. Absence of *any* of these steps would be fatal. *All* of them are absent.

4. The "commingling" point (Hudson question 3) raises a question as to whether the allegedly unconstitutional sections of the Ohio Act are severable from the constitutional sections. This is purely a question of State law, not a Federal question. See p. 52, below.

5. Although substantive due process (Hudson question 2) was raised in Hudson's Petition, this question was not discussed in Hudson's brief in the trial court and was abandoned in the Court of Appeals and the Ohio Supreme Court. In those courts, only State due process questions were raised. Having been abandoned below it cannot be raised in this Court. *Herndon* v. *Georgia*, 295 U. S. 441 (1935). In any event, the unanimous opinion of this Court in *Old Dearborn Dist. Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936), has foreclosed this issue. The economic wisdom of State statutes is no longer a judicial question under the due process clause of the Fourteenth Amendment. *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963). Thus, even if due process had been preserved as a Federal question, it does not raise a substantial question which would support jurisdiction. *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U. S. 390 (1952); *Zucht* v. *King*, 260 U. S. 174 (1922).

Therefore, appellant cannot sustain its burden that the Federal questions urged on this Court were properly raised in the Ohio Supreme Court and in fact passed on there. Accordingly, this appeal should be dismissed even

were the Court to decide that the judgment is otherwise "final" under §1257.

Dismissal is also required under the holdings in *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450 (1945); *C.I.O.* v. *McAdory*, 325 U. S. 472 (1945); and *Rescue Army* v. *Municipal Court*, 331 U. S. 549 (1947). In *Alabama State Federation of Labor* the principal question was whether "petitioners' contentions are so related to any case or controversy presented by the record that this Court may appropriately pass upon them in a declaratory judgment proceeding." 325 U. S. at 453-54. After noting that the State court had not fully construed the sections of the State statute and had not applied the statute to a concrete set of facts so that this Court would know how the statute should be construed, the opinion continued:

> "Obviously, no decision of the constitutional issues now posed could be made in this suit, and no opinion could be written, without considering all and deciding some at least of these questions of statutory interpretation. No state court has decided them, briefs and argument offer us little aid in their solution, and no solution which we could tender would be controlling on the state courts. The record supplies us with no concrete state of facts to which the challenged sections, when construed, could be applied." (325 U. S. at 459-60)

This unanimous holding is particularly applicable in the case at bar where the Ohio Supreme Court has never interpreted or construed the Ohio Act in the areas in which the Federal challenges are made by Hudson.

POINT II

Considered on the merits, none of the questions presented raises a real issue with respect to Federal law or the Federal Constitution.

Although Hudson purports to present five Federal questions to this Court, three involving the McGuire Act (Hudson's questions 1(a), 1(b), and 1(c)), one involving due process, and the last an ancillary question at best, Hudson fails to correlate these questions with its argument here or to specify the legal premise of its basic contentions. Hudson seems to waver between attacking the Ohio Act on its face and alleging its invalidity as applied to the facts of this case.

Hudson misconceives the essential nature of its Supremacy Clause argument in persistently claiming that the Ohio Act is "void" and that the Ohio Act could only have been passed by Congress. The Federal antitrust laws including the fair trade "enabling" statutes do not void "unauthorized" State fair trade laws but only make them unenforceable as applied in interstate commerce situations. In this case the only issue which can properly be raised by Hudson under the Federal antitrust laws is whether the Ohio Act, as construed by the Ohio Supreme Court and applied to the facts in this case, is within the exemptions of the Miller-Tydings Act and McGuire Act.

The discussion below deals with these questions in the order listed in Hudson's Questions Presented. It does not include a discussion of the asserted conflicts of the Ohio Act with the Lanham Trade-Mark Act, 60 Stat. 427, as amended, 15 U.S.C. §1051 *et seq.* (1958 and Supp. IV, 1963), or the Federal Food, Drug and Cosmetic Act, 52

Stat. 1040, as amended, 21 U.S.C. §301 *et seq.* (1958) (Brief pp. 36, 60, 72-76). These arguments were not considered below and were not mentioned in either the notice of appeal (R. 426-27) or the Jurisdictional Statement. They are thus not properly part of this appeal. [18]

A. On the Facts Before the Courts Below, There is No Evidence that Upjohn's Distribution System was in Conflict with the *McKesson & Robbins* Case (Hudson's Question 1(a)).

In persuading this Court to entertain this appeal, Hudson's principal attack was that the Ohio Act and Upjohn's distribution system were in conflict with §5(a)(5) of the McGuire Act and the doctrine of *United States* v. *McKesson & Robbins, Inc.*, 351 U. S. 305 (1956).

In its Jurisdictional Statement, Hudson alleged

> (i) that §1333.29(A) of the Ohio Act, which allows a proprietor under certain circumstances to establish minimum resale prices for his wholesale distributors even though he sells to retailers in competition with them, conflicts with the *McKesson & Robbins* case and *Esso Standard Oil Co.* v. *Secatore's, Inc.*, 246 F. 2d 17 (1st Cir.), *cert. denied*, 355 U. S. 834 (1957);
>
> (ii) that this provision was designed to aid "manufacturers such as the Upjohn Company, who sell directly to retailers, while at the same time *selling* to wholesalers with whom they compete for the retailer's business" (emphasis added) (p. 11);
>
> (iii) that "Upjohn has availed itself of the horizontal price-fixing provisions of the Ohio Act by entering into agreements with wholesalers of its products with whom it competes and by fixing

18. Rules 10(2)(c), 15(1)(c) and 40(1)(d)(2) of this Court. *Cf. General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 177-79 (1938).

> wholesale resale prices to retailers. Upjohn calls these agreements '*del credere* agency' contracts. . . The titles given to these agreements with wholesalers cannot mitigate their true nature as horizontal price-fixing agreements among competing wholesalers and manufacturers in violation of the Sherman Act" (pp. 14-15).

It is not entirely clear from the Hudson brief what argument is now being made on this point. Although the *del credere* agency arrangements are still referred to (Brief pp. 37, 78), Hudson does not contend that Upjohn *sells* to the *del credere* agents but concedes that the agency agreement "retains in Upjohn the ownership of Upjohn products in the hands of such wholesalers" (Hudson Brief p. 18). Nor does the claim any longer appear that Upjohn's consignment arrangements with wholesalers are not true agency relationships.

Hudson's acknowledgment of Upjohn's relationship with its agents is dictated by the state of the record, for none of the factual allegations quoted above from the Jurisdictional Statement had been supported by any findings of fact or uncontroverted evidence below. The basic issue itself had been reserved by stipulation of counsel and, even without the stipulation, the affidavits and deposition, which incompletely and briefly discuss certain aspects of the Upjohn distribution system, raised material issues of fact. See pp. 26-27 above. These issues would have to be developed by the parties and resolved before a ruling could properly be made on Hudson's affirmative defense alleging the illegality of Upjohn's use of *del credere* agency agreements.

Although Hudson retains the allegation that one of Upjohn's agents, McKesson & Robbins, Inc., is a "com-

peting wholesaler" of Upjohn (Brief pp. 16, 37, 78), there is no evidence in the record to support this allegation. McKesson & Robbins' salesmen and salesmen from Upjohn's Cleveland branch may call on some of the same pharmacists, but since Upjohn's goods are only consigned to its agents and not sold, these agents are not wholesalers in the conventional sense of the term. At most the allegation that McKesson & Robbins is a competing wholesaler is a disputed issue of fact which requires a determination by a trier of fact.

In any event it is clear that Hudson in its brief to this Court has changed the argument made in its Jurisdictional Statement. Hudson no longer contends that Upjohn availed itself of that provision in §1333.29(A) of the Ohio Act which permits a manufacturer to set resale prices with wholesalers with whom it is in competition on sales to retailers.

Indeed, Upjohn has never relied on that provision nor suggested that any proprietor of a trade-mark could rely on it in interstate commerce. As Upjohn did not sell to wholesalers it did not attempt to establish fair trade prices at the wholesale level. This is demonstrated by the Upjohn "Wholesale Catalogue" (Hudson's Exhibit 5; R. 433-64) which provides solely for the establishment of *retail* fair trade agreements (R. 437). The portions of the catalogue setting forth prices clearly distinguish between the price at which Upjohn's agents sell the goods ("price to retailer"), and the stipulated "minimum resale price" of which notice is given in the catalogue.[19] The only minimum resale prices are those charged by retailers

19. See *e.g.* the prices listed for Kaopectate (R. 458). The price to the retailer is $.63 for six ounces, the minimum resale price being $.81.

to consumers, not by wholesalers on sales to retailers (R. 437).[20]

Nor is it at all clear that the Ohio courts, if faced with the question, would determine that the challenged part of §1333.29(A) is applicable in interstate commerce. In view of the *McKesson & Robbins* case, it would clearly be open to the Ohio courts in a proper case to limit the applicability of this provision to intra-state transactions. The Ohio courts, however, have so far not been called upon to pass on this point.

Finally, although the issue is not here, Upjohn's use of *del credere* agents is valid under the antitrust laws. This Court in *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), upheld the right of a manufacturer to maintain resale prices by selling through wholesale and retail agents. The key question was one of fact, whether the dealers were *bona fide* agents.[21] The Upjohn agency agreement (R. 105-09) satisfies all the normal indicia of an agency relationship, as Hudson has apparently now conceded. Except for the affidavit of Hudson's counsel which was refuted in full by Upjohn (see p. 26 above), there is no evidence in the record that the relationship is in fact one of vendor-vendee rather than principal-agent.

20. Hudson has erroneously interpreted a rather ambiguous colloquy in the deposition of Vern L. Smith (R. 95-96) as establishing that Upjohn organized price maintenance at the wholesale level by notice to wholesalers (Brief pp. 37 and 78); but it is clear that wholesale agents have been given no notice of any fair-traded prices other than the retail prices (R. 437). See also Mr. Smith's later affidavit (R. 105). As Upjohn did not sell to wholesalers, it did not attempt to establish fair trade prices at such level.

21. In 1948 the Government claimed that even if the General Electric contracts had originally established *bona fide* agencies, this relationship was no longer maintained. This contention was rejected. *United States* v. *General Electric Co.*, 82 F. Supp. 753, 817-27 (D. N. J. 1949).

Appellant alleges that Upjohn's *del credere* agency relationships "appear" to violate the rule of *United States v. Masonite Corp.*, 316 U. S. 265 (1942). Such a contention is unsupported by any record facts and is outside the issues of the validity of the Ohio Act and its relationship to the McGuire Act. Nowhere raised in the court below, the *Masonite* argument is an independent attack under the Sherman Act on Upjohn's *del credere* arrangements. As such, this argument is beyond the scope of this case as posed by Hudson in its petition for a declaration of the constitutionality of the Ohio Act. Certainly, a Sherman Act inquiry into the validity of a distribution system requires a delineation of such issues at the trial level and the opportunity to adduce evidence on material facts, which was never present in this case.

In any event, the *Masonite* case is inapposite. *Masonite* held that the Sherman Act is violated where a manufacturer appoints most of the competitors in an industry as his agents to sell; the market effect of the designation was thus widespread, combining substantially all the competitive sellers under one roof and requiring all to deal in the products of one manufacturer at uniform prices—a situation not even remotely approached by the case at bar.

B. Hudson's Assertion that the Ohio Act Allows Upjohn to Compel its Distributors to Enter into "Horizontal" Agreements is Unrelated to the Facts in the Case and Unsupported by Any Evidence in the Record (Hudson's Question 1(b)).

Hudson's persistence in attacking the bare language of the Ohio Act completely divorced from the facts of this case is nowhere more evident than with respect to its second McGuire Act argument in which it has seized

upon two sub-sections of § 1333.29(B) of the Ohio Act and attempted to read into the bare words of these sub-sections authorizations for illegal horizontal price-fixing agreements.[22] See *e.g.* Hudson Brief pp. 57-60. Its argument is as follows: Section 1333.29(B) provides that a contract or notice *may* contain clauses (2) and (3) which allow a proprietor to require a distributor with whom he contracts to enter into the same agreement with another distributor to whom the first distributor may resell; the definition of the term "distributor" in § 1333.28(E) *could* include a sale by a retailer to another competing retailer; *ergo*, §§ 1333.29(B)(2) and (3) permit horizontal price-fixing and are void under the Supremacy Clause since the McGuire Act and Miller-Tydings Act specifically forbid "horizontal" agreements.

This argument is quite unreal in the context of this record. Sub-sections (2) and (3), when and if used by a proprietor, are undoubtedly designed to give protection in a multi-tier vertical distribution system, in addition to the

22. Section 1333.29(B) provides:

"(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell."

basic agreement by the buyer that the buyer will not resell the commodity at less than the stipulated price, as authorized by sub-section (1). As Upjohn sold only to retailers, either directly or through *del credere* agents, it had no need of the provisions authorized by sub-sections (2) and (3) and did not use them.

Upjohn's relevant Retailer Agreement is in the record (Exhibit 1 to Answer, R. 25-26). It does not contain a single clause justifying appellant's argument on this point. It contains no clause by which the retailer is either authorized or compelled to enter into further agreements with other distributors. *A fortiori*, these signed documents do not compel—or authorize—horizontal price-fixing. The sole price maintenance provisions in these signed agreements are one-tier and vertical. Upjohn "established stipulated minimum retail prices in Ohio" (R. 25), which are those designated in its catalogue, and the retailer has thereby agreed not to sell *at retail* Upjohn trade-marked products for less than the minimum resale price stipulated by Upjohn (R. 26).

Neither of the circulars sent out by Upjohn, which gave notice of the prices established by the signed agreements, contained any clause which could remotely be considered as allowing or compelling horizontal agreements (R. 4, 27). Similarly there is nothing in Upjohn's *del credere* agency agreement (R. 105-09) which even arguably authorizes or compels such agents to enter into agreements with other distributors. To the contrary, the agency agreement provides (R. 107):

> "6. Agent has no authority to dispose of any of the goods received by him upon consignment except as above provided and shall not control or attempt to control prices at which any purchaser from agent shall sell any of such consigned goods purchased from agent."

Hudson has not pointed to anything in Upjohn's agreements, the circulars or any of the affidavits or the deposition which even alludes to the possibility that Upjohn compelled its retail distributors to enter into agreements with others, much less into horizontal price-fixing agreements. Its whole argument is *in vacuo*.

Further, this argument turns on a very questionable interpretation of the Ohio Act not sanctioned by any Ohio decision. Section 1333.34 provides that the Act "shall not, except as otherwise *specifically* provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers" (emphasis added). This section prohibits horizontal price-fixing except as otherwise specifically provided in §1333.29. The exception brings in the provision of §1333.29(A) authorizing a proprietor to establish minimum resale prices for his wholesale distributors under certain circumstances even though he sells to retailers in competition with such distributors "notwithstanding section 1333.34 of the Revised Code". The exception does not extend to §§1333.29(B)(2) and (3) which neither specifically provide for their applicability in horizontal price-fixing situations nor cross-refer to §1333.34. Yet, as interpreted by Hudson, the exception swallows up the provision and makes §1333.34 as a whole meaningless.

In the absence of a construction of a State statute by the State courts, this Court should not construe the statute to be unconstitutional if it is possible to avoid a constitutional problem. *Alabama State Federation of Labor* v. *McAdory*, quoted at p. 30 above. The statutory language here involved has not been construed by the Ohio Supreme Court. It clearly *can* be construed in such a way as to avoid the hypothetical problem raised by

Hudson, and would have to be given a strained construction even to raise the problem.

For all these reasons, this "Federal" claim invoked by appellant has no basis.

C. The Manner in which Upjohn Established its Ohio Resale Price Maintenance Program was Fully in Accord with the Ohio Act and Federal Law (Hudson's Question 1(c)).

Upjohn established its stipulated minimum prices in Ohio by entering into signed agreements with various retailers (R. 25-26) and then sent notices to retail pharmacists in the state announcing that it had "signed new Fair Trade contracts establishing minimum retail prices in Ohio" (R. 4). This procedure followed to the letter the Ohio Act which provides: "'It shall be lawful . . . for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity . . .' §1333.29(A).

Under the enforcement provision of the Ohio Act, §1333.32(A), Upjohn then became entitled to enforce the stipulated minimum prices which it had established by written contracts against (i) "any distributor who is in contract with" Upjohn and (ii) "any distributor with notice that [Upjohn] has established a stipulated minimum resale price." The Ohio Supreme Court has determined that the enforcement by Upjohn of the stipulated minimum resale prices against those, such as Hudson, who have not actually signed a contract or agreement is constitutional under the Ohio Constitution since the legislature has determined by the definition of the word "contract" in §1333.28(I) that distributors who buy with notice of established prices and use a proprietor's

trade-mark have impliedly agreed not to sell below those prices.

The opinion of the Ohio Supreme Court recognized that the "heart" of the Ohio Act was the doctrine of implied contract in §1333.28(I) and noted that a person who acquired a brand-name commodity "after actual notice that the proprietor has *established* a minimum resale price is bound to observe *that price*" (R. 415, emphasis added). Later, the court added that the provision was the "core of the act" and "it provides in essence that, when a retailer with notice that an item *has been fair-traded* procures it for resale, he is deemed to have entered into an implied contract . . ." (R. 417, emphasis added).

The State court concluded that Upjohn's method of establishing prices complied with the Ohio Act in a fact situation involving (i) signed agreements followed by (ii) notice that Upjohn had established stipulated prices by written contracts and (iii) use of the Upjohn trade-mark by Hudson after receipt of such notice.

Hudson obfuscates the real issue involved in this case by ignoring the clear sanction of paragraph 3 of the McGuire Act (§5(a)(3)). Paragraph 3 provides that Upjohn can enforce its minimum resale prices against Hudson whether Hudson "is or is not a party" to a contract.

There are actually two paragraphs of the McGuire Act involved in this case. The first is paragraph 2 which in the provisions pertinent here states that nothing in the Federal antitrust laws

> ". . . shall render unlawful any contracts or agreements prescribing minimum or stipulated prices . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State . . ."

The second is paragraph 3, which as far as pertinent here, provides that the Federal antitrust laws shall not render unlawful the enforcement

> ". . . of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State . . . which in substance provides that . . . selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so . . . selling is or is not a party to such a contract or agreement . . . is actionable at the suit of any party damaged thereby."

These paragraphs were designed to restore the effectiveness of State Fair Trade Acts "by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to nonsigners as well as signers" H.R. Rep. No. 1437, 82d Cong., 2d Sess., p. 2 (1952).[23] Although Hudson attacks the Ohio Act as in violation of Federal law, never once in its brief is the scope or purpose of paragraph 3 of the McGuire Act discussed. Reference to *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951), and the Miller-Tydings Act (Brief p. 50) is hardly relevant.

Moreover, the Ohio statute, as applied in this case, comes within the very language of the McGuire Act and the purpose as stated in §1 of the Act (66 Stat. 631-32):

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs

23. "Under all these circumstances, the committee feels amply justified in recommending enactment of H.R. 5767, as amended, which would permit the several States to experiment further with fair-trade legislation." H.R. Rep. No. 1437, 82d Cong., 2d Sess., p. 5 (1952).

> and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce."

If the *implied* contract between Hudson and Upjohn, which is a valid Ohio contract, is included in the phrase "contracts or agreements" in paragraph 2 of the McGuire Act, then it is lawful for Upjohn to enforce such contract or agreement against a person who *is* "a party to such contract or agreement" under paragraph 3. While at the time this Court decided *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951), no state Fair Trade law incorporated the concept of an implied contract to bind non-signers, an implied contract is now a legally enforceable contract in Ohio and Virginia. Since paragraph 2 of the McGuire Act exempts from the antitrust laws any contracts or agreements which "are lawful as applied to *intrastate* transactions under *any statute, law, or public policy now or hereafter in effect in any State*," this Court must look to State law to see whether the implied "contract or agreement" between Hudson and Upjohn qualifies under the McGuire Act. Since a notice of the established prices plus the purchase and use of a proprietor's brand name products creates a valid contract under Ohio law, such a contract qualifies under paragraph 2 of the McGuire Act and is enforceable against "a party to such a contract" under paragraph 3.

The very text of paragraph 2 of the McGuire Act as well as its legislative history compels the conclusion that the "contracts or agreements" thereby carved out as lawful exceptions from the antitrust statutes are such "contracts or agreements" as State law recognizes or creates. Indeed, contracts or agreements by implication of law are among the oldest heads of the common law. Nothing in *Schwegmann* forecloses the possibility that, if the Louisiana law had implied a voluntary contract with respect to the resale of trade-marked articles upon purchase of the goods after notice of the resale price, the Miller-Tydings Act would have been held to exempt such a contract.[24] This has been recognized by the Virginia court. See *Standard Drug Co.* v. *General Electric*, 202 Va. 367, 117 S.E. 2d 289, 298-99 (1960), *appeal dismissed*, 368 U. S. 4 (1961). However that may be, Congress has now made abundantly clear by the language and purposes set forth in the McGuire Act, as passed, 66 Stat. 631-32, that the term "contract" would be governed by State law.

Even if the "implied contract" recognized by the Ohio Act is held not to be within the meaning of "contracts or agreements" in paragraph 2 of the McGuire Act, paragraph 3 provides separate and independent sanction for enforcement against Hudson. Upjohn is entitled under paragraph 3 to enforce against Hudson the stipulated prices established by the written contracts with other retailers, even though Hudson is a person "not a party to such [written] contract or agreement." As indicated above, the McGuire Act was enacted to make clear that Federal laws permit enforcement against such a person.

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24. The Senate Report accompanying the Miller-Tydings Act, S. Rep. No. 2053, 74th Cong., 2d Sess., at p. 2 (1936) stated that "the bill does no more than remove Federal obstacles to the enforcement of contracts which the States themselves have declared lawful".

Thus, under Ohio law Upjohn can enforce established prices against Hudson since Hudson is deemed to be bound by implied contract, while under Federal law it does not matter whether Hudson is bound by contract or not. Since Federal policy allows enforcement against persons who are not parties to a contract, it clearly allows enforcement in this case where the State legislature and courts have found Hudson to have voluntarily contracted.

Hudson apparently makes one further argument—that the McGuire Act demands that the State pass a statute "of a kind" which requires, and not merely permits, the establishment of resale prices by written "contracts or agreements" before a party can enforce "such a contract or agreement" under paragraph 3. See Hudson's Brief pp. 35-36, 49, 67. Such a contention finds no support in the history of the Miller-Tydings and McGuire Acts, the policy behind them, or the language of either act.

It is clear from the identical language of the Miller-Tydings Act and paragraph 2 of the McGuire Act—"when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State"—that the Congress laid down no special form of State statute as a necessary foundation for the operation of those acts. Both of them were "enabling" acts in that they permitted the various States to adopt fair trade laws and exempted certain contracts or agreements made pursuant to State law from the Sherman Act and Federal Trade Commission Act. The phrase *"any* statute, law, or public policy *now or hereafter in effect"* explodes Hudson's theory that Congress had a particular kind of statute in mind.

The McGuire Act, paragraph 3, makes the matter even more certain with the words "in substance provides". There

could be no clearer demonstration that Congress passed the McGuire Act to permit the States "to experiment further with fair-trade legislation", as the House Committee said (H.R. Rep. No. 1437, 82d Cong., 2d Sess. p. 5 (1952)). Congress intended to make it abundantly clear that in order to effect the public policy of many States "the exercise or enforcement of the right or rights of action created under State law against a person not a signatory to a resale price maintenance contract" was exempted from Federal antitrust law. See H.R. Rep. No. 1516 on H.R. 6925, 82d Cong., 2d Sess. at 17 (1952). Very clearly, paragraph 3 is a license to the States to enact fair trade legislation, if they wish, which binds both those who sign contracts and those who do not, whether the latter are deemed under State law as non-signers or parties to an implied contract.

In arguing that the Ohio Act is not "of a kind" envisaged by Congress, Hudson cites neither the language of the codified statute nor the introductory portion of the statute as passed, both of which are unambiguous, nor the reports of the Congressional committees, which negative the argument. Instead, without showing any need for an examination of legislative history, Hudson looks to (i) inconclusive statements in the floor debates (Brief pp. 44-45) and (ii) elaborate discussion of Congressional activity *subsequent to* the enactment of the McGuire Act, which is clearly irrelevant. An unsuccessful subsequent attempt to broaden fair trade legislation is not a part of the "legislative history" of the McGuire Act, whether or not bills are reported out or hearings held. See *United States* v. *Philadelphia Nat'l Bank*, 374 U. S. 321, 348-49 (1963); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 47-48 (1950); *Order of Ry. Conductors* v. *Swan*, 329 U. S. 520, 529 (1947).

F.T.C. v. *Travelers Health Ass'n*, 362 U. S. 293 (1960) (Brief pp. 30, 49) does not justify Hudson's treatment of fair trade legislation. In that case the Court was called on to construe §2(b) of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 61 Stat. 448, 15 U.S.C. §§1011-15 (1958) and particularly the phrase "regulated by State law". Both the majority and dissenting opinions analyzed the statutory language and legislative history of that act. The *result* in that case is irrelevant here since completely different Federal statutes are involved. The *problem* is the same in that this Court must seek the basic purpose of Congress in enacting the McGuire Act. Measured by that purpose, the actions by Upjohn in establishing a price maintenance program as authorized by Ohio and seeking to bind Hudson are clearly within the basic Congressional intent.

In the last analysis, however, even were Hudson right that Congress intended to prohibit a statute establishing prices by "notice alone", there has been no determination by the Ohio Supreme Court that the Ohio Act is such a statute. The Ohio Act does not necessarily authorize establishment by notice alone. Section 1333.29(A) just as easily can be read to require the *establishment* of prices by contract first, and then "control by notice to distributors or by contract". Section 1333.32(A), which makes it unlawful for a distributor "with notice that a distributor *has established* a stipulated minimum resale price" to sell below that price, is as consistent with the first interpretation as with the second. Similarly, the definition of an agreement in §1333.28(I) uses the same phrase.

The statute is in any event open to the construction that it requires signed contracts and then notice of these signed contracts in a situation involving interstate commerce. Indeed, the opinion of the Ohio Supreme Court in this case is not inconsistent with this interpretation. Upon the facts

of this case, and in light of the language of the court below, Hudson cannot require this Court to construe State law in a way which might, in the view of the State court, be in violation of Federal law.

Upjohn has fully complied with the Ohio Act. The provisions of the Ohio Act relied on by Upjohn fully comply with the McGuire Act.

D. The Ohio Fair Trade Act, as Applied to Hudson, Does Not Violate Substantive Due Process (Hudson's Question 2).

Almost thirty years ago this Court held in companion cases that State fair trade laws, including conventional non-signer provisions, did not violate either the due process clause or the equal protection clause of the Fourteenth Amendment. *Old Dearborn Dist. Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936); *Pep Boys, Manny, Moe & Jack of California, Inc.* v. *Pyroil Sales Co.*, 299 U. S. 198 (1936). Recent cases of this Court have made it emphatically clear that the day has long passed when the economic wisdom of State statutes presents a substantial Federal question under the Fourteenth Amendment. As this Court recently stated in *Ferguson* v. *Skrupa*, 372 U. S. 726, 730-31 (1963):

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.'

> [citation omitted] Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' [citation omitted] It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [citation omitted]"

It is for this reason that we forbear to argue the merits of State fair trade legislation as was done in the *Old Dearborn* case. The record here abundantly illustrates (R. 161-366) the economic factors involving the encouragement of small business and the protection of property in trade-mark form which caused the Ohio legislature to enact the Ohio Act. This enactment has now been sustained by the Ohio Supreme Court. On the state of the record and the established decisional and statutory basis for Ohio's action, we deem it superfluous to burden the Court in this brief with a detailed presentation of the policy involved, particularly in view of the full development of this point in the two amicus briefs in support of Upjohn in this case and Lilly in No. 490. Suffice it to say that the action by the Ohio legislature falls squarely within the power which the States have "to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U. S. 525, 536 (1949).

E. Whether a State Statute as a Whole is Void Because of an Unconstitutional Portion is Not a Federal Question (Hudson's Question 3).

Hudson's Jurisdictional Statement requested this Court to strike down the Ohio Act as a whole because "federally unconstitutional provisions" are so commingled with the rest of the statute to make the entire Ohio Act void under the Federal Constitution. This purported Federal issue is listed as a question presented, but is nowhere argued in Hudson's brief and apparently has been abandoned.

This question, in any event, could not have rested on its own. Further, whether a void or unenforceable section of a statute is severable or not is a question of legislative intent. Since the intent involved here is the intent of the Ohio legislature, severability of a provision in the Ohio Act is purely a question of Ohio law. See *Dorchy* v. *Kansas*, 264 U. S. 286, 289-91 (1924).

Conclusion

For the reasons stated, this appeal should be dismissed for lack of jurisdiction in this Court on the present record. If jurisdiction is retained, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

Federal Statutes:

1. Jurisdiction and Venue—Supreme Court (28 U.S.C. §1257)

§1257. State courts; appeals; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

2. The McGuire Act (66 Stat. 631-32)

AN ACT

To amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to such contracts and agreements, and for certain other purposes.

Appendix

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

SEC. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

"SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy

now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corpo-

rations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Approved July 14, 1952.

State Statute:

Ohio Fair Trade Act of 1959 (selected sections)

§1333.28 Definitions.

As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

. . .

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

. . .

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such

commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

. . .

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish minimum resale prices for such commodity in the state.

§1333.29 Contracts or notices establishing minimum resale prices.

(A) It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of

the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the

minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

§1333.32 Unfair competition; remedies.

(A) Except as provided in section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price at less than such stipulated minimum resale price, to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with such sale or offering to sell and

the sale or offering for sale of such commodity with any other commodity for a single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof, or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor, provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established;

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

§1333.34 Exempt agreements.

Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.